No. 89-792

IN THE

Supreme Court of the United States

October Term, 1989

OLYMPIA BREWING COMPANY,

Petitioner,

-against-

LOUIS P. SINGER,
as Successor in Interest to Troster, Singer & Co.,

Respondent.

FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTORY STATEMENT

The Petition fails to present any legal issue to be considered by this Court. Olympia Brewing Company ("Olympia") seeks to challenge the same

facts found by the jury in the District Court, having already attempted unsuccessfully to reargue the proof of those very same facts in its motion for summary judgment, its motion for judgment notwithstanding the verdict, its appeal to the Court of Appeals, Second Circuit, and its petition for a rehearing by the Court of Appeals. Olympia's attempt to create a question of law is predicated upon a blatant mischaracterization of the record, falsely implying that the findings of fact were drawn from inferences when, as substantiated in the Statement of the Case below, the verdict was supported by ample evidence considered after a comprehensive charge acceptable to Olympia.

Contrary to petitioner's contention, this is not a case in which scienter was

grounded "on the permissible inferences which may be drawn when the evidence offered to support an intent to defraud can equally support a legitimate or wrongful motive." (Pet. 4).[1] Moreover, as substantiated by the facts set forth in the Statement of the Case below, the verdict was not grounded on "highly ambiguous evidence". (See Pet. 11). In fact, as the Second Circuit found,

> "the evidence amply supports the jury's determinations that Olympia made material misstatements or omissions, did so with scienter...." (Appendix at A-6)

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[1]Numbers following "Pet." refer to page numbers of the Petition.

STATEMENT OF THE CASE

Respondent Louis P. Singer ("Singer") is the successor in interest to Troster, Singer & Co. ("Troster, Singer"), a professional market-maker. As a market-maker in a particular security, Troster, Singer either regularly published bid and asked quotations in an interdealer system or furnished such quotations on request, and was "ready, willing, and able" to trade reasonable quantities of the security in which it was making a market to other dealers at its quoted prices. As a market-maker, Troster, Singer put buyers and sellers together, acting as a conduit between buyer and seller making its profit from the "spread", i.e., the difference between the bid and asked

price. Accordingly, a market-maker makes his profit from the volume of trades in which it participates and is less concerned with the price of a stock.

Petitioner Olympia Brewing Company ("Olympia") was a beer manufacturer and distributor, operating primarily in the northwestern United States. Olympia's stock was traded on the over-the-counter market.

Manipulation of Olympia Stock

It is uncontested that Olympia's stock was the subject of an ongoing manipulation by R. Jack Bernhardt ("Bernhardt"), a registered representative of Loeb Rhoades & Co. ("Loeb Rhoades") who was indicted and convicted for his role in the stock manipulation, and that between June 1976 and January 1977 the manipulation

increased the price per share from $26 to $50. In late 1976 and early 1977, Olympia's financial advisor, William Sword & Co. ("Sword"), being aware of the false rumors being generated by Bernhardt and the accumulation of shares by Bernhardt's customers, discussed these matters with Olympia's management which continued to monitor the activity in its stock.

Olympia's Knowledge and Use of the Manipulation

Wishing to take advantage of the inflated stock price, Olympia embarked upon an acquisition program, acquiring Lone Star Brewing Co. ("Lone Star") and engaging in discussions with All Brands Importers Inc. and other companies. It was also concerned about the possibility of being taken over, and the inflated

stock served as a deterrent. Indeed, when Bernhardt arranged for the German brewer Oetker to approach Olympia in February, 1977, representatives of Olympia told Oetker that it expressly did not wish to be acquired and further advised Oetker that Bernhardt's and Loeb Rhoades' manipulation of Olympia stock violated Federal securities laws.

As Olympia's stock price continued to rise, reaching $60 a share by early March, the monitoring of the manipulation by Olympia and its advisers increased, but as the Lone Star exchange had still not been completed, no disclosure of the manipulation was made. The record is replete with evidence of Olympia's knowledge of the manipulation and realization of its effects, including the recognition that a public disclosure of

the manipulation would cause the stock price to drop. In his January 14, 1977 memorandum, Joseph Self ("Self") of Sword attributes the false rumors to Bernhardt, and a memorandum of a meeting on January 25, 1977 among the Sword personnel, states "plus they know of all this manipulation". Self's notes of the meeting also confirm the discussion of the manipulation of Olympia stock. On February 9, 1977 William Sword and Self together with Joseph Flom, Esq. ("Flom") of Skadden Arps Slate Meagher & Flom ("Skadden Arps"), counsel for Olympia, met with partners of Loeb Rhoades in New York to discuss the accumulation of Olympia shares at Loeb Rhoades and Bernhardt's and Loeb Rhoades' illegal activities. At the meeting, Loeb Rhoades assured Olympia that it was not engaged

in a takeover attempt. A memorandum from Self dated February 9, 1977 concerning the meeting states that Sword advised Loeb Rhoades that "the rumors are having a substantial impact on the price of stock." The February 24, 1977 memo in Sword's files stated that Olympia knew that its shareholders would be "screwed", and by late February, Olympia knew Loeb Rhoades was dumping its shares of Olympia stock and that those purchasing the stock would be badly burned. Self characterized the manipulation as a "ponzi" scheme. On March 3, 1977, Skadden Arps decided to draft a complaint on behalf of Olympia against Bernhardt. That complaint includes a cause of action grounded on Bernhardt's manipulation of the price of Olympia stock. By that date, with the price at

$60 per share, Olympia decided that the SEC should be advised, and Flom telephoned the Securities and Exchange Commission ("SEC") to report the false rumors and Bernhardt's manipulative activities. Olympia, however, did not reveal this information to the press or the public.

On March 7, 1977 Barron's published an article in which Olympia stock was reported to be overpriced. The article referred to a statement by an Olympia representative that the company would not be acquired, which statement omitted the fact that Olympia knew of the ongoing manipulation of its shares. Ultimately, at the urging of the SEC, Olympia started to issue press releases about its stock price, one on March 13, 1977 and the other March 15, 1977, in which it failed

to reveal its knowledge of the manipulation and falsely denied any knowledge of the reasons for the erratic behavior of the price of its stock. The SEC then suspended trading in the stock from March 15 to March 25, 1977. After the suspension, Olympia still attempted to conceal its knowledge and use of the manipulation by sending a deceptive letter to its shareholders on March 18, 1977 promising "to make every effort to keep you as informed as possible on any significant developments."

Troster, Singer's Trading in Olympia Stock

Commencing on or about January 11, 1977, Troster, Singer became a market-maker in Olympia securities. From January 11 through March 4, 1977, Troster, Singer's position in Olympia was

insignificant. At the opening of business on March 7, 1977 Troster, Singer owned 731 shares of Olympia.

The publication on March 7, 1977, of the Barron's article induced selling of Olympia shares. As the price of the shares fell. Troster, Singer, which was not aware of Bernhardt's and Loeb Rhoades' manipulation of the market for Olympia stock, continued to trade the stock as a market-maker, anticipating that the falling price would stabilize as the negative information was digested by the market. By the time the SEC suspended trading, Troster, Singer was out-of-pocket $1,977,990 and was left holding 53,025 shares of Olympia. When trading resumed on March 25, 1977, the price of Olympia was $27 per share.

ARGUMENT

Petitioner omits to reveal to the Court that as early as January, 1977 there were notes in the files of Sword, Olympia's financial advisors who kept in daily communication with Olympia executives, characterizing the acts of Bernhardt, which had caused the dramatic rise in the price of Olympia's stock, as "fraud". The same people who knew of the Olympia fraud had circulated a memo stating that Olympia should take advantage of its high-priced stock, among other things, to make acquisitions. Olympia was, in fact, trying to make acquisitions during this period. The All Brands acquisition, to which petitioner refers, was not the only acquisition contemplated by Olympia during that period. Liability is therefore

warranted. Brennan v. Midwestern United Life Insurance Co., 417 F.2d 147 (7th Cir. 1969), cert. denied 397 U.S. 989 (1970).

Calling the SEC on the telephone is not the requisite disclosure to the public required by the law. Dirks v. SEC., 463 U.S. 646, 653 n.12 (1983); In re Faberge, Inc., 45 S.E.C. 249, 256 (1973); 3 Bromberg, Securities Fraud and Commodities Fraud, § 6.11 (560) at 138.505 and 138.507 (1985). In fact, on March 4, 1977, the day after Olympia's lawyer spoke with the SEC - which was at least six weeks after Olympia learned of the fraud - an Olympia executive officer, who was very knowledgeable about the fraud, was interviewed by a reporter from Barron's. The Baron's reporter asked the reasons for the rise of Olympia's stock.

The Olympia executive made no mention of the fraud. Nine days thereafter, when its stock was plummeting, when neither it nor anyone else had yet to warn the public, Olympia issued a press release denying any knowledge of the reasons for the erratic behavior of its stock.

The jury was given the opportunity to hear evidence of Olympia's acts, omissions and its intentions. There was no doubt or confusion as to the motives or understanding of Olympia. Special questions were posed to the jury. The charge to the jury was reviewed by Olympia and not challenged, and the portion of that charge with respect to scienter excludes the possibility of inferences and places the burden of proof squarely on Singer:

> "The question of whether a person acted with intent to

defraud or with reckless disregard is a question of fact for you to determine, like any other fact question. It is a question involving state of mind.

Direct proof of state of mind is almost never available. You can't look into someone's brain. Thus, direct proof is not required. Circumstantial evidence, if believed, is of no less value than direct evidence. In either case, it is the plaintiff's burden to prove all of the elements by a preponderance of the evidence.

Since an essential element of the plaintiff's case is intent to defraud or recklessness, it follows that an honest belief in the truth of the representations made by a defendant is a defense, however inaccurate the statements may turn out to be. It is no defense, however, that Olympia may have believed or was led to believe by others, including counsel for the SEC, that it acted legally under the circumstances. Whether it acted illegally is for you to determine.

As a practical matter, then, in order to sustain the charges against Olympia, Singer must

> establish by preponderance of the evidence that Olympia knew or should have known that its course of conduct was calculated to deceive.
>
> To conclude on this element, if you find that Olympia did not act knowingly and lacked the intent to deceive, or did not act recklessly, you should return a verdict in favor of Olympia." (Trial Transcript pgs. 1062-1063 at A 1121- A 1122 of the Joint Appendix to the Second Circuit)."

Having had its motion for summary judgment denied. Olympia moved for a directed verdict, which was denied. (Appendix at A-13), and having a jury verdict returned against it, Olympia sought judgment notwithstanding the verdict, which was denied (Appendix at A-12). Interestingly, the District Court found the very same arguments which Olympia now makes to be fallacious:

> "In short, the Court concludes that the evidence presented by plaintiff in support of his

claim of a primary violation is more than the slender reed that Olympia suggests it is. The jury was justified in concluding, as it did, that plaintiff proved the defendant had committed a primary violation of the federal securities laws." (Appendix at A-15).

On appeal,- the Second Circuit reviewed these very same claims, and found that Olympia's position was unsupported:

> "the evidence amply supports the jury's determinations that Olympia made material misstatements or omissions, did so with scienter, and caused Singer's losses of $1,345,592.50." (Appendix at A-6).

REASONS FOR DENYING THE WRIT

The premises upon which the Petition is based are fallacious. The verdict was not premised on "highly ambiguous evidence". As confirmed by both the trial and appellate courts, the evidence to support the jury verdict was ample

without any inferences. The Hochfelder standard was more than satisfied by the repeated direct documentary and testimonial evidence of intent to defraud.

Even were there a need to limit the range of permissible inferences, or standards for circumstantial evidence, the body of law associated with securities cases provides adequate standards without looking to practice in anti-trust trials.

Since, in fact, the verdict against Olympia was not based on inferences, regardless of its characterization by Olympia, this would be an inappropriate case to consider for purposes of addressing inferential evidentiary standards applicable in Federal securities cases.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,
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Counsel of Record

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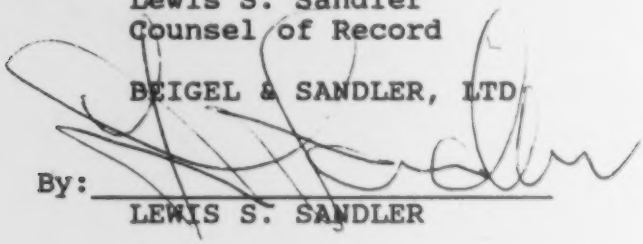

By: _____
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